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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRENT REGAN and MOURA REGAN, husband and wife,	)	**DOCKET NO. 40848-2013**
Plaintiffs/Respondents	)	**Kootenai County Case No. CV-2011-2136**
vs.	)	**APPELLANTS' REPLY BRIEF**
JEFF D. and KAREN A. OWEN, husband and wife,	)	
Defendants/Appellants.	)	

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN P. LUSTER
DISTRICT JUDGE, PRESIDING

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I. TABLE OF CONTENTS

II. TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

Other:

III. INTRODUCTION

In their statement of the case and introduction to their arguments on appeal, Regan contends this suit regards their right to use an existing roadway that passes through the tax parcel purchased by Owen. Nothing in the record defines the location of the road that lies partially within the tax parcel vis-à-vis the tax parcel. Regan did not introduce any evidence to the trial court regarding the location of the road other than aerial pictures showing the road and the Kootenai County assessor's approximation of the property boundaries which was not prepared by a surveyor, and the accuracy of which is not determined by any evidence in the record.

Regan also contends in their statement of facts on appeal that the legal description contained in the 1999 fulfillment deed from ACH to Marchelli recorded as Instrument No. 1586858 included the centerline of the roadway surveyed by K.A. Durtschi in 1979 as one of the property boundaries. That claim is unsupported by the facts in the record. The first fallacy of this statement is that the 1979 survey by Durtschi of Section 27 indicated a proposed road that was not constructed. Thus, K.A. Durtschi did not survey an existing road as claimed by Regan.[1]

The second fallacy is the claim that the ACH deed to Marchelli included the centerline of the 1979 proposed road as one of the property boundaries. All of the Regan property lies west of the Owen property. The disputed road is not referenced in the Marchelli deed as demonstrated in the record.

To assist in following the Marchelli deed description, the legal description of the Marchelli deed (AR p. 66) with the deed calls numbered and color coded is attached as Appendix A to this Brief. These deed calls are correlated to the enlarged 1986 Record of Survey commissioned by Hargis with the same color coding (AR p. 360).

[1] The 1979 K.A. Durtschi survey was of Section 27 only. It did not purport to survey any portion of Section 34 where the Owen (Smart) parcel was located, and gave no indication that the unconstructed road was intended to attach to parcel location in Section 34.

The point of beginning of this legal description is the northwest corner of Section 34, far west of the Owen parcel. The legal description contains 24 metes and bounds calls. These calls proceed in a counter clockwise procession. The seventh, eighth and ninth deed calls encompass an area near the Section 27 and Section 34 shared section line. The deed indicates that a line that runs westerly near this shared boundary line is designated as Point "A" on the east end and Point "B" on the west end. The deed indicates that a strip of land 30 feet in width between Point "A" and Point "B" is reserved as an easement for access and utility purposes to adjacent lands.[2] This reserved easement lies west of the proposed road shown on the 1979 Durtschi survey. At no point in the legal description is the centerline of the 1979 unconstructed road referenced as a boundary. The only boundaries incorporating roads are a boundary south of the Section 27 and Section 34 section line, which incorporates a county road as a boundary, and a northern and western boundary, which again incorporated a county road (Borley Road) as a boundary. Thus, Regan's attempt to bolster their position that the road existed in 1999 because it was included in the Marchelli deed is unfounded.

In their statement of facts, Regan maintains that the road that is the subject of this litigation existed at the time they purchased their property in 1999. In their opening appeal brief, Owen provided numerous references to the record that demonstrate that the existence and location of this road in 1999 was highly disputed by the evidence before the trial court. Like the trial court, Regan ignores the disputed facts and maintains the road existed as it does today at the time of all the relevant grants. However, ignoring these disputed facts does not make them go away. The trial court did not have clear and convincing undisputed evidence before it of the existence of this road in 1999. However, these disputed facts are relevant to the prescriptive easement issue and not the issue of mutual mistake.

[2] The deed does not identify the lands benefited by the reserved easement.

Regan claims the tax deed parcel was "orphaned" when ACH deeded all of its remaining property except for the segment acquired by Owen from Kootenai County by tax deed. It is true that ACH owned a large parcel of property that it deeded to Marchelli. It is also true that the Marchelli transfer left the tax parcel in ACH's possession because it was not included in the sale, and Kootenai County thereafter assigned a new tax number to the parcel retained by ACH after the transfer.

Regan concedes that there are disputed facts regarding the road, but contends they concern the question of when the roadway was constructed. Regan then selectively cites to portions of the record to persuade this Court that the road existed at all times. The first selected evidence is affidavit testimony from Kootenai County surveyor Bruce Anderson. Anderson gave an affidavit in support of Regan's preliminary injunction and testified that he was of the opinion from looking at aerial maps that the road existed as early as 1987. AR pp. 319-323. Owen required that Regan produce his affiants at the preliminary injunction for cross examination as allowed by I.R.C.P. 65. AR pp. 324-325. Regan did not produce Bruce Anderson at the preliminary hearing and the trial court struck Anderson's affidavit. 5/31/2012 Preliminary Hearing Tr p. 6, l. 3 – p. 9, l. 7.

On appeal, Regan also utilizes portions of the Smart affidavit, ignoring the conflicting deposition testimony given by Smart to contend that the road existed along the northern boundary of the Smart parcel. Regan concedes that Patricia Honeyman (Hart) testified at the preliminary injunction that no road existed from Bonnell Road in 1979 when she purchased her property, and a portion was built after Judith Johnson built her property. Regan ignores David Johnson's testimony that the portion that was built only fronted their property, and terminated at the east boundary of the Owen parcel. AR pp. 362-364.

Regan also contends on appeal that they attempted to build a road across the North 30' of the Owen parcel within the express easement, but Owen's interference with their efforts made it impossible for them to proceed with developing the easement. This claim is not supported by the facts in the record. Regan built a road within the express easement on the Owen parcel. AR pp. 181, 243, 255, 301; 5/31/12 Preliminary Hearing Tr p. 152, ll. 2-19, 158, ll. 9-15, 24-25; 159, ll. 1-6; p. 160, ll. 14-22; p. 102, l. 25, p. 163, p. 164, l. 1-4; 178, ll. 23-25, 179-180. In doing so, Regan trespassed upon the Owen parcel, dumping debris consisting of trees and brush removed from the easement onto Owen's front yard. Owen contacted the sheriff's department about Regan's trespass, and subsequently filed a counterclaim for trespass in this matter. Regan dismissed their claim of contempt. AR pp. 686-689. Regan submitted an offer of judgment on the trespass claim. R pp. 113-115. Thus, Regan's posture on appeal that they were prohibited from developing the easement across the Owen parcel is not supported by the facts in the record.

IV. ARGUMENT

A. Introduction

In their introduction to their arguments, Regan informs this Court that they were not aware of the any issues regarding their easement rights until 2010 because they had used the road for 11 years without interference. Regan's scope of use of the easement for the claimed time period was disputed at the preliminary injunction by both Owen and Hart. While this disputed fact may be relevant to Regan's prescriptive easement claim, it is irrelevant to the issue of whether Regan's cause of action for deed reformation is barred by the applicable statute of limitation.

B. Regan's deed reformation cause of action is time-barred

In the present case, the trial court held that the evidence before it "shows that neither the Original Owners nor the buyers (the Smarts) knew of the deficient legal description at the time of the sale and delivery of the deeds." R. p. 105.

The trial court's conclusion is not supported by the record and is not the appropriate legal standard to apply in a deed reformation case. In *Aiken v. Gill*, 108 Idaho 900, 902, 702 P.2d 1360, 1362 (Ct.App. 1985), the Court of Appeals held that an action seeking relief from mistake was time-barred under I.C. § 5–218(4) unless it was filed within three years after the mistake could have been discovered in the exercise of due diligence. Whether a party has exercised due diligence is a question of fact.

Regan claims the trial court did not err in making the above finding. In opposition to Owen's position on appeal, Regan contends that there is no evidence in the record to support the claim that ACH reviewed and approved the legal description of the Smart deed at the time of the sale to Smart. Regan also contends there is nothing in the record that demonstrates that ACH had any constructive or actual knowledge relevant to the mistake regarding the location of the northern boundary.

It must be remembered that ACH sold all of the properties surrounding the Owen parcel and the access road. ACH was involved in the development plan that proposed the access road. In 1988 when the Smart transaction closed, ACH had constructive and actual knowledge of the layout of the proposed road.

The 1979 Durtschi survey was recorded and gave constructive notice of its contents, including the proposed road alignment. Another survey was done in 1986 which gave the same constructive notice regarding the proposed road alignment. These surveys clearly showed that

the proposed road swung north on the west end of the Johnson parcel and was located upon property in Section 27. The Owen (Smart) parcel was the next parcel west of the Johnson parcel. Thus, the surveys gave constructive notice that the proposed road did not lie within Section 34. The 1979 survey was commissioned by BAR-ACH, Inc. AR p. 350. ACH were members of Bar-Ach. AR pp. 551-553. At a minimum, the record shows ACH had constructive knowledge of the location of the road relative to the Owen (Smart) parcel, if not actual knowledge of the location of the proposed road.

Regan also disclaims that the record reveals any review or approval of the Smart legal description by ACH. The record clearly demonstrates such review and approval of the deed description. The deed is signed by all of the Grantors. Then, in an uncommon occurrence, the Exhibit "A" legal description carries separate "Approved" signature lines below the legal description for both the grantors and the grantees. The grantees did not approve the legal description, and their signature lines are crossed out. However, each and every grantor for ACH separately approved the legal description. R p. 31. As pointed out in Owen's opening brief on appeal, the legal description attached to the Smart deed clearly stated that the northern boundary of the Smart parcel ran along the Section 34 section line.

Thus, the undisputed facts are that at the time ACH signed the Smart deed and separately approved the legal description utilized therein, they had constructive (if not actual) knowledge that the access road north of the Smart parcel lay in Section 27. ACH had actual knowledge that the Smart deed set the northern boundary of the Smart parcel as the Section 34 line. Thus, ACH had the means in the exercise of due diligence to discover the facts giving rise to their claim of mistake. Therefore, the trial court committed error in finding that the original owners did not "know" of the mistake. The trial court should have found that the original owners had the means

in the exercise of due diligence to discover the facts giving rise to the claim of mistake, and that a cause of action for deed reformation is therefore barred. Because ACH is barred from pursuing deed reformation to correct the alleged mistake, their successor in interest, Regan, is also barred.

C. The statute of limitations affirmative defense against Regan remains viable

Regan claims that the statute of limitations did not commence to run against him until he became an aggrieved party. Regan claims he was not an aggrieved party until he was denied use of the access road. No case law supports Regan's position. Regan also claims he was not aggrieved because he obtained a legal opinion in 2003 that indicated his property had easement rights across certain adjacent properties. Again, Regan's position is unsupported by authority in the law.

Regan misreads the meaning of an of an aggrieved party under I.C. § 5-218(4). An aggrieved party is one whose property rights are affected by the mistake. No statute or case law supports the position advanced by Regan that "aggrieved party" means a party who has a grievance because he perceives a neighbor is invading his property rights.

The proper inquiry is when should Regan, as an aggrieved party whose property rights were affected by the alleged mutual mistake, in the exercise of due diligence, have discovered facts indicating that a mutual mistake occurred. Regan's appeal argument in response to this issue is inconsistent with their appeal argument regarding Owen's status as a bona fide purchaser.

Regan purchased their property in 1999. A survey was recorded in 1997 showing the separation of the two easements that benefited Regan's parcel and clearly showed the separation of the easements. Regan had constructive notice of the Hart deed, the Johnson deed, the Doney deed and the Marchelli deed that they claim on appeal gave Owen constructive notice of the

mutual mistake. Thus, if Owen had notice of the mutual mistake is 2003 based upon these same documents, Regan certainly had notice of the mutual mistake in 1999 when they purchased.

Regan presents an argument on appeal where they wish to have their cake and eat it too. As the benefited property owner, Regan claims that the documents available to them did not give them constructive notice of the mutual mistake. Yet later in their appeal brief in discussing Owen's status as bona fide purchasers, they turn around and claim those same documents should have alerted Owen of the mutual mistake. Regan fails to appreciate the difference in their status as compared to Owen's status at the time of purchasing. In 2003, Owen purchased a surveyed parcel that was subject to an express easement, which showed on their predecessor's deed. Owen was not the owner benefited by the easements, and had no reason to explore the easements across their neighbor's properties that benefited Regan. On the other hand, Regan purchased the property benefited by reserved easements and had a constructive notice of those documents that related to their access rights, including reviewing the 1979 survey, the 1986 survey, the 1997 survey, the Hart deed, the Johnson deed, the Lonam deed and the Marchelli deed.

Despite all the constructive notice pointed out in Owen's opening brief and briefly touched upon above, Regan claims that because he had a legal opinion in 2003 that his rights were valid that he exercised due diligence and was excused from discovering facts regarding the mutual mistake at that time. At best, this argument states a position that there was a material question of fact that prevented entry of summary judgment in Owen's favor on the affirmative defense, assuming the ACH bar did not exist. However, this disputed fact did not vitiate the affirmative defense.

Moreover, the relevant period of inquiry regarding whether Regan had constructive notice of the mutual mistake is at the time of their purchase in 1999. Regan claims in their reply

brief that they discovered the mutual mistake after investigating all of the above information after being denied access in 2010. The record clearly showed that there was constructive notice in 1999 of all the facts Regan claims gave them notice in 2010 of the mutual mistake. However, Regan did not exercise due diligence in reviewing those facts and discovering the mistake in 1999.

D. The district court erred in weighing the evidence on Regan's claim of mutual mistake and failed to draw all inferences in the light most favorable to Owen

In their response, Regan contends that the trial court was presented with uncontested affidavits from Thomas Collins and Harold Smart that support the conclusions reached by the trial court that there was a mutual mistake. Regan ignores Harold Smart's deposition testimony, which contradicted his affidavit in large part. *Appellant's Opening Brief, pp. 15-17.* In *Capstar Radio Operating Company v. Lawrence*, 153 Idaho 411, 416, 283 P.3d 728, 733 (2012), this Court ruled that there is a fine line between drawing the most probable inferences from uncontested facts and weighing evidence. When a witness gives contradicting affidavit and deposition testimony, the trial court is presented with an evidentiary conflict. Regan fails to discuss in their response on appeal any of the conflicting evidence given by Harold Smart in his deposition. The trial court also failed to acknowledge the conflicting testimony and focused solely on the affidavit testimony of Harold Smart. When the conflicting deposition testimony of Harold Smart is considered, it is apparent that inferences reached by the trial court required a weighing of the evidence, and a decision regarding which disputed facts to utilize. Thus, the trial court erred in granting summary judgment when there were disputed issues of material fact.

E. The District Court erred in finding there was undisputed evidence of a mutual mistake

Regan contends the trial court did not err in finding there was a mutual mistake regarding the location of the northern boundary of the Smart parcel because Smart and ACH shared a common misconception about the same basic assumption, i.e. the location of the northern property boundary of the Smart parcel. Regan claims because Collins believed the northern boundary was the center of the road, and Smart believed it was the center of the road, there was a mutual mistake. Regan claims this is true even though it is undisputed that the parties never discussed the location of the northern boundary and the sales agreement required the parcel to be surveyed and the corners to be marked.

Regan claims a mutual mistake can arise from an uncommunicated mutual boundary assumption. In Idaho, a mistake may justify grounds for relief if it is so substantial and fundamental that it defeats the object of the parties and does not accurately represent the agreement of both parties. *Belk v. Martin*, 136 Idaho 652, 657, 39 P.3d 592, 597 (2001). However, in *Chandler v. Hayden,* 147 Idaho 765, 772, 215 P.3d 485, 492 (2009), this Court was clear that when reforming an instrument, the court gives effect to the contract that the parties did make, but that by reason of mistake was not expressed in the writing executed by them. Thus, the parties must have an agreement and a shared misconception about a fact for that misconception to become a ground for a mutual mistake. No case law supports Regan's position that a mutual mistake occurs in a negotiation if each party can holds an undisclosed assumption which was not discussed or agreed upon if it is later proven to be mutual assumption each party held. This reasoning flies in the face of *Chandler v. Hayden*, and seeks to give effect to a term the parties did not make at the time of contracting.

The trial court erred in its findings of undisputed facts, and the inferences to be drawn from the facts before it. Drawing the inferences from the evidence before the trial court in the light most favorable to Owens demonstrates there are disputed facts whether there was a mutual mistake which precluded summary judgment. Those inferences are the road did not extend in front of the Smart parcel at the time Smart purchased the property. The parties never discussed the boundaries of the property. No agreement was reached regarding the location of the northern boundary. Given these inferences from the disputed evidence, it was error for the trial court to grant summary judgment.

F. Owen is a bona fide purchaser who was not on inquiry notice of the mutual mistake

In their brief regarding the statute of limitations, Regan claimed that "While these characteristics [location and shape] make the orphan a strange and undesirable piece of land, they do not create actual or constructive knowledge of a mutual mistake." *Respondents' Brief p. 10.* Yet, Regan claims that Owen was on notice of the alleged mutual mistake.

Regan acknowledges the trial court analyzed the bona fide purchaser status based upon the 2005 purchase of the tax parcel. Regan does not address whether analysis of Owens' status at this point in time was error by the trial court.

Instead, Regan argues that in 2003, when Own purchased the Smart parcel from successor Hanna, that Owen was not a bona fide purchaser. Regan claims that Owen's title commitment put them on notice of the alleged mutual mistake. Owen cites to their counsel's affidavit wherein this title commitment was submitted in the record before the trial court. AR p. 406, ¶6.

Regan claims this title commitment expressly identified and excluded from coverage the 1988 warranty deed from ACH to Smart and record of survey Smart commissioned in 1994.

This claim is not correct. In the Schedule B exceptions to title coverage, exception 11 indicated that provisions in the deed recorded as Instrument No. 1137747 (the deed from ACH to Smart) were excluded from coverage. AR 420. Exception 12 indicated matters shown on the 1994 Smart survey were excluded.

The provisions of the Smart deed excluded from coverage was the reserved express easement. R. p. 31. The matters shown on the 1994 survey was the existence of a fence line on the eastern boundary of the Smart parcel which was not situated on the property line. The 1994 survey also showed a portion of the access road cutting across the northeastern corner of the Owen parcel. However, nothing in these documents provided notice of a mutual mistake.

Regan also fails to address Owen's authority on appeal that Regan had the burden of showing that all subsequent purchasers bought with notice of the mutual mistake in the original deed. 66 Am. Jur. 2d Reformation of Instruments § 62 (Westlaw database updated September 2013). There is no evidence in the record that any of Owen's predecessors in title (Bower and Hanna) had any notice of the alleged mutual mistake. Thus, the trial Court erred in reforming the deed absent Regan establishing this fact. The trial court's finding that Owen was not a bona fide purchaser should be reversed.

Another error committed by the trial court in holding that Owen was not a bona fide purchaser was the trial court's failure to analyze Owen's knowledge at the time of the purchase of their parcel in 2003. The trial court analyzed Owen's status as a bona fide purchaser based upon their 2005 purchase of the tax parcel. Regan inherently acknowledges this error and claims the record supports a finding by this Court on appeal that Owen was not a bona fide purchaser in 2003.

Regan's argument in support of its position on appeal on this issue is contrary to their argument regarding the application of the statute of limitations as discussed previously in this brief. Regan claimed they did not have constructive knowledge in either 1999 (the time of purchase) or 2003 (the time of their legal opinion) to put them on notice of the mutual mistake. Yet, they claim all the same information available to them at each of these time periods were facts Owen should have discovered in the exercise of due diligence, thus stripping Owen of the status of a bona fide purchaser. Owen was not the owner benefited by the easements to Regan's property, and had no reason to explore the easements across neighboring properties as did Regan to determine if a proposed development plan that was never completed provided a continuous road access corridor for the benefit of Regan. Owen had no reason to investigate whether the developer who owned their property had intended to utilize the access road shown on a 1979 development scheme survey that never came to fruition. Regan, as the benefited property owner of the road proposed in that development scheme had every reason to exercise due diligence to ascertain that the proposed access easements were properly reserved. When Owen purchased, 14 years had elapsed since the recording of the 1979 proposed development. Nothing gave them notice that the developer had not abandoned the proposed access road shown in a proposed subdivision that never occurred.

Regan also maintains the trial court did not err in its analysis of the prejudice to Owen if the deed were reformed. Regan contends that Owen "voluntarily" reformed their legal description by purchasing the tax parcel and combining it with their original parcel for the purposes of receiving a single tax bill. Regan further claims that the trial court's deed reformation actually reduced the burden to Owen. Regan claims that by reforming the deed, the trial court allowed Owen to avoid having an easement developed across their original parcel.

Regan's claims are senseless. Owen paid valuable consideration for the tax parcel in addition to the amount they paid for the Smart parcel they purchased from Hanna. If the tax parcel were truly part of the original Owen parcel, Owen would not have paid valuable consideration to acquire it. Thus, Owen is out the purchase price of the tax parcel.

When Owen purchased the tax parcel, they had never seen Regan use the access road. 5/21/2012 Preliminary Injunction Hearing Tr p. 249, l. 12- p. 250, l. 251, lo. 8. From Owen's perspective, the edge of a driveway used by their neighbor, Joseph Lonam, to access his property might have been encroaching on the northern boundary of the tax parcel. The rest of the tax parcel was available for Owen's unrestricted use and enjoyment. From Owen's perspective, they gained control of a piece of property that had a line of trees that provided a visual buffer to their home from properties to the north. The tax parcel also provided drainage for their parcel to the north.

Following the trial court's deed reformation, the entire tax parcel became encumbered with an express easement that can be developed for roadway and utility purposes for the benefit of Regan's property. The trees can be removed. The drainage pattern can be altered. Owen no longer controls development of the tax parcel. This burden is significantly greater than anticipated when Owen purchased the t ax parcel.

Further, Regan's claim on appeal that the easement across the Smart parcel was not developed by Regan is pure fiction. Regan's contractor, Jonathan Verkist, specifically testified at the preliminary injunction hearing that he grubbed and cleared the easement across Owen's parcel, widened it, removed at least four large pine trees and brush from the easement, and brought in and laid down truck loads of road base material. AR pp. 181, 243, 255, 301; 5/31/12 Preliminary Hearing Tr p. 152, ll. 2-19, 158, ll. 9-15, 24-25; 159, ll. 1-6; p. 160, ll. 14-22; p. 102,

l. 25, p. 163, p. 164, l. 1-4; 178, ll. 23-25, 179-180. Regan confessed to trespassing on Owen's land outside the boundaries of the easement in developing the easement across the Owen parcel. R pp. 113-126. Thus, Owen's parcel has been significantly altered by Regan.

Regan further claims that the tangible and practical benefits of reformation to Owen clearly outweigh or mitigate the intangible aesthetic concerns expressed by Owen and makes a deed reformation equitable. Nothing could be further from the truth. Owen has not been reimbursed for the tax parcel purchase. In an attempt to bully Owen into abandoning their rights to the tax parcel, a road was developed across Owen's parcel. Considerable road base material was laid down, and large mature pine trees and brush removed that were part of a line of trees and brush that provided a visual buffer to properties to the north were removed. Now the tax parcel that has the remaining copse of trees and brush that provide the remaining visual buffer to the north for the Owen parcel has been deemed to be subject to an express easement. The trees and brush on that parcel may be removed, thus stripping the visual buffer Owen wished to maintain between their property and the properties to the north of them.

There are no tangible benefits to Owen to the deed reformation. They paid valuable consideration to obtain control of a parcel so they could control the use and enjoyment of that parcel. They have lost the use and enjoyment of that parcel, including controlling its development or removal of the trees and brush they wished to protect. In summary, Owen is left without the benefit for which they paid valuable consideration. Further, Owen is left with a road developed across their parcel. The trees that were removed will not grow back in Owen's life time. Another road may now be developed parallel to the one that was already developed on their property, leaving a wide barren strip on the north boundary of their properties. Deed reformation provided no benefit to Owen, and was inequitable to Owen.

G. The trial court should have applied waiver and estoppel to bar Regan's equitable claim for deed reformation

Regan claims on appeal that this action was filed because Regan refused to acknowledge they had any rights across their property, including an express easement. This claim is not true. In correspondence with Regan's counsel in April, 2010, Regan's easement across Owen's parcel was acknowledged. AR 170. This suit was filed in March, 2011. R p. 2.

Regan claims it was necessary and proper to confirm the express easement rights as a component of the mutual mistake claim. Regan ignores that besides confirming the easement rights, they developed the easement across the Owen parcel. It is their act of developing the easement that raises the bar of waiver and estoppels.

Regan claims they had no choice but to move forward as they did by confirming the express easement on the Owen parcel, developing the easement and then moving forward with their claim of deed reformation. This claim lacks merit on several basis.

First, in their answer to the complaint, Owen did not dispute that there was an express easement for the benefit of Parcel II across their parcel. The summary judgment was not necessary to establish this right as claimed by Regan. The partial summary judgment presented by Regan to the trial court for entry included a provision that Regan could develop the easement. Regan immediately commenced such action.

Regan claims on appeal because they were building a home for their daughter that they had to develop the easement across the Owen parcel. Regan ignores that they could have moved forward with the preliminary injunction hearing that they eventually requested and received from the trial court to use the disputed access road.

Second, Regan blames the course of action they took on Owen, claiming that Owen blocked their attempt to develop an access road on the Owen parcel after Regan obtained the first summary judgment. Regan cites to their contempt motion as support for their claim

It is undisputed that Regan trespassed on the Owen parcel in developing the easement. Regan confessed judgment on this trespass. Regan's contractor testified he deposited the construction debris in Owen's yard area even though he was concerned that Owen had not given permission for the debris to be placed outside the easement on Owen's property. 5/31/12 Preliminary Hearing Tr p. 176, ll. 16 – p. 177, l. 25. Regan's contractor indicated Regan directed him to take this action. 5/31/12 Preliminary Hearing Tr p. 178, ll. 1-19. ll. 1-22. Owen called the sheriff and reported the trespasses. Thereafter, Regan filed a motion for contempt with the district court claiming Owen was "interfering" with the development of the easement because they called the sheriff on two occasions when Regan trespassed outside the easement, and insisted Regan stay within the easement. Regan contends on appeal that the course of Regasn's actions were dictated by Owen's action. Owen did not require Regan to trespass on their property. Regan made that determination on their own.

Regan also contends on appeal that they never developed the easement across the Owen parcel. As discussed previously in this brief, the record on appeal clearly shows the road was developed. In fact, after the easement across Owen's parcel was developed, it was subsequently used by commercial trucks. 5/31/12 Preliminary Hearing Tr, p. 227, l. 12 – p. 230, l. 18; Clerk's Certificate of Exhibit, p. 59 (Exhibit KK); p. 60 (Exhibit LL).

Regan also cites to their own contempt motion as establishing justification for their change in position regarding their easement rights across Owen's property. Regan claims that

they abandoned use of the road across the Owen parcel because of Owen's actions which interfered with Regan's use and enjoyment of the easement.

Regan's contempt papers did not comply with the fundamentals of I.R.C.P. 75, and were subject to dismissal on that basis. The motion did not allege the items required by I.R.C.P. 75. The papers were filed as a motion with a notice of hearing. The actions which Regan claimed Owen took that interfered with their development of the easement included calling the sheriff to report Regan's trespasses outside the easement. However, as Jonathan Verkist testified at the preliminary injunction hearing, he moved forward with the improvement of the easement. Of even greater consequence, Regan's contempt allegations were voluntarily dismissed by Regan. AR pp. 686-689. Given Regan's confession of judgment on the actions Regan claimed in their contempt motion interfered with their development of the easement, combined with Verkist's preliminary hearing testimony that he developed the easement across the Owen parcel, there is no substance to Regan's claim that Owen's actions prevented them from developing the easement across the Owen parcel.

Regan's purpose in trying to shift the attention from his action to Owen is to avoid an analysis of whether Regan changed their position regarding their legal rights. Regan sought and received a judgment of the trial court declaring they had an express easement right across the Owen parcel, including the right to move forward with development of the easement across the Owen parcel. Thereafter, Regan asserted that right and developed the easement. Regan then changed their position to have the deed reformed to relocate the northern boundary to the detriment of Owen because it suited Regan's desires.

Even though this issue was raised to the trial court, it did not address the issue in its opinion. The trial court erred by failing to address and apply estoppels and waiver in this case.

H. The trial court erred in ruling Regan was entitled to summary judgment on their prescriptive easement claim

In the alternative to its rulings on the deed reformation, the trial court held that Regan was entitled to summary judgment on their prescriptive easement claim. Regan concedes the trial court erred in its analysis of this issue on summary judgment and should be reversed.

V. CONCLUSION

The trial court erred in granting summary judgment in favor of Regan. For the reasons set forth in this appeal, the trial court's summary judgment should be reversed.

RESPECTFULLY SUBMITTED this 25TH day of November, 2013.

JAMES, VERNON & WEEKS, P.A.

Susan P. Weeks

SUSAN P. WEEKS
Attorneys for Appellants/Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of November, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Scott L. Poorman
Scott L. Poorman, P.C.
8884 North Government Way, Suite E
P.O. ox 2871
Hayden, ID 83835

☑ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail

Christine Elmore

A

1586858

EXHIBIT "A"

Order No. 34495

A tract of land in Sections 27, 28 and 34 all in Township 50 North, Range 3 W.B.M., Kootenai County, Idaho, and more particularly described as follows:

Beginning at the Northwest corner of said Section 34 (POB) (1); thence South 00°28'27" West along the West line of the Northwest quarter said Section 34 a distance of 692.12 feet; (2) thence South 89°22'06" East a distance of 445.86 feet; thence (3) South 00°29'37" West a distance of 947.36 feet to the intersection with the Northerly right-of-way of the County Road; thence South 89°22'06" East along (4) the right-of-way a distance of 1336.62 feet; thence North 00°33'07" East a (5) distance of 947.35 feet; thence North 89°22'06" West a distance of 428.28 (6) feet; thence North 00°25'26" East a distance of 716.49 feet to Point "A" for (7) this description; thence North 89°07'47" West a distance of 183.40 feet to a (8) point of curve; thence along a 400.00 foot radius curve to the left a distance (9) of 97.97 feet to Point "B" for this description, curve chord bears South 83°51'13" West a distance of 97.73 feet; thence North 01°33'55" East a (10) distance of 798.39 feet; thence South 89°07'43" East a distance of 264.57 (11) feet; thence North 01°33'57" East a distance of 515.10 feet; thence North (12) (13) 89°16'28" West a distance of 996.30 feet; thence North 01°53'12" East a distance of 634.56 feet to the intersection with the Southerly right-of-way (14) of the County Road; thence North 89°20'52" West along said right-of-way a distance of 300.92 feet to the intersection with the Easterly right-of-way (15) of the County Road; thence South 01°59'38" West along said right-of-way a (16) distance of 634.21 feet; thence North 89°16'28" West a distance of 30.01 (17) feet to Point "C" for this description; thence South 01°59'39" West a (18) distance of 38.48 feet to a point of curve; thence along a 750.00 foot radius curve to the right a distance of 198.58 feet, curve chord bears (19) South 09°34'45" West a distance of 198.00 feet; thence South 17°09'51" West a distance of 280.46 feet to Point "D" for this description; thence (20) North 89°40'59" West a distance of 568.64 feet to the intersection with (21) the West line of Lot 5, First Addition to Sunnyside; thence South (22) 01°50'44" West along the West line of Lot 5 and Lot 12, said First Addition to Sunnyside a distance of 804.60 feet to the intersection (23) with the North line of the County right-of-way; thence North 89°59'14" East along said right-of-way a distance of 666.25 feet to the intersection (24) with the West line of the Southwest quarter said Section 27; thence South 01°59'39" West a distance of 25.02 feet to the Point of Beginning.

A strip of land 30.00 feet in width within the above tract of land which adjoins and lies parallel to the courses between Point "A" and Point "B" as described therein is reserved as an easement for access and utility purposes to adjacent lands.

ALSO

A strip of land 30.00 feet in width within the above tract of land which adjoins and lies parallel to the courses between Point "C" and Point "D" as described therein is reserved as an easement for access and utility purposes to adjacent lands.

STATE OF IDAHO }ss.
COUNTY OF KOOTENAI }

MAR 04 2011

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORD IN THIS OFFICE
Instrument #1586858000

CLIFFORD T. HAYES Clerk/Recorder By: Deputy

585pgs

B

Book 8 Pg 80

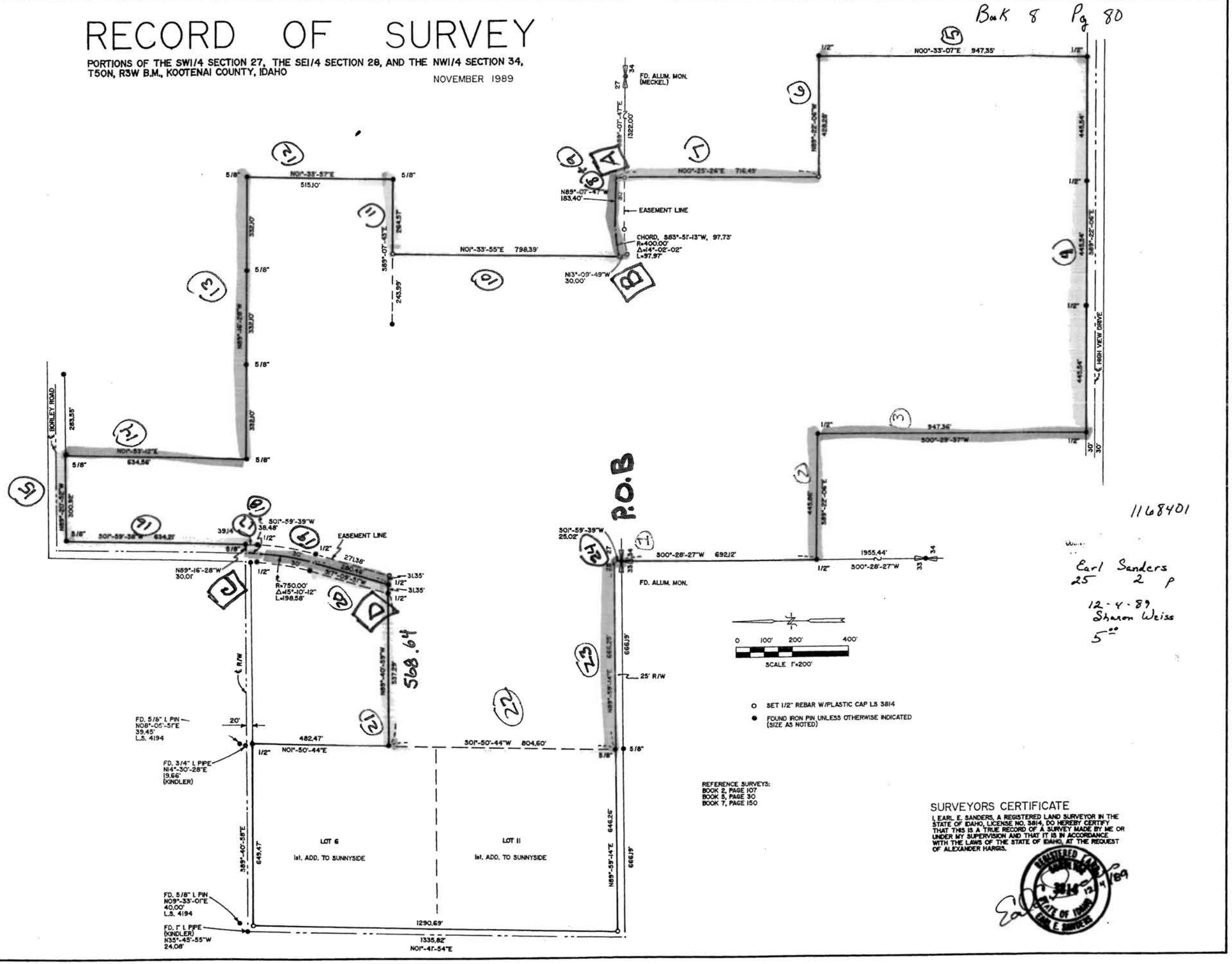
RECORD OF SURVEY

PORTIONS OF THE SW1/4 SECTION 27, THE SE1/4 SECTION 28, AND THE NW1/4 SECTION 34, T50N, R3W B.M., KOOTENAI COUNTY, IDAHO

NOVEMBER 1989

1168401

Earl Sanders
25 2 p
12-4-89
Sharon Weiss
5⁰⁰



REFERENCE SURVEYS:
BOOK 2, PAGE 107
BOOK 5, PAGE 30
BOOK 7, PAGE 150

SURVEYORS CERTIFICATE

I, EARL E. SANDERS, A REGISTERED LAND SURVEYOR IN THE STATE OF IDAHO, LICENSE NO. 3814, DO HEREBY CERTIFY THAT THIS IS A TRUE RECORD OF A SURVEY MADE BY ME OR UNDER MY SUPERVISION AND THAT IT IS IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO, AT THE REQUEST OF ALEXANDER HARGIS.

REGISTERED LAND SURVEYOR 3814 STATE OF IDAHO EARL E. SANDERS 12/4/89